SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1967

JOSEPHINE HANNER,
Petitioner,

v.

CECIL DEMARCUS,
Respondent.

No. 497

APPENDIX
OF
RECORD

PHILIP M. HAGGERTY
1220 Arizona Title Building
111 West Monroe
Phoenix, Arizona
Attorney for Petitioner

ROBERT JOHN WALTON
610 Arizona Land Title Building
2200 North Central Avenue
Phoenix, Arizona
Attorney for Respondent

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111 West Monroe
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2200 North Central Avenue
Phoenix, Arizona
Attorney for Respondent

Case No. 49044:

JUDGMENT AND DECREE OF DIVORCE

June 21, 1959

Paragraph II

That the sum of $5,572.10 is a reasonable sum as asked for as Master's fee and it should be paid to Harold DeMarcus of the firm of Crane and DeMarcus, as Master, within a reasonable time; that said sum and said Master was necessary by reason of the action of the defendant, Josephine E. Hanner, and that the defendant, Josephine E. Hanner, should pay the aforesaid sum to Harold DeMarcus of Crane and DeMarcus, Master, within a reasonable time, and that sixty days from the signing of this Judgment that the Master May have a Writ of Execution against the Defendant, Josephine E. Hanner, if not paid.

* * *

EXHIBIT B
SHERIFF'S DEED
49044

THIS INDENTURE, Made the 27th day of March, 1962, BETWEEN L. C. BOIES, Sheriff of the County of Maricopa, State of Arizona, the party of the first part, and HAROLD De MARCUS of said County of Maricopa, the Party of the second part.

WHEREAS, by virtue of a Writ of Execution issued out of and under the seal of the Superior Court of the County of Maricopa, State of Arizona, attested the 18th day of September, A.D. 1959, upon a judgment recovered in said Court on the 2nd day of June, A.D. 1959, in favor of HAROLD DeMARCUS, and against JOSEPHINE E. HANNER, to the said Sheriff directed and delivered, commanding him that out of the personal property of said judgment debtor in said county, he should cause to be made certain moneys in the said writ specified, and if sufficient per-

sonal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the 2nd day of June, A.D. 1959, or at any time afterwards;

AND, WHEREAS, because sufficient personal property of the said judgment debtor could not be found, whereof the said Sheriff could cause to be made the moneys specified in said writ, the said Sheriff did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtor so had to the lands, tenements real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the 29th day of October, A.D. 1959, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises, at public auction, in front of the Court House, in the City of Phoenix, in said County of Maricopa, between the hours of nine in the morning and five in the afternoon of that day, namely, at 10:05 o'clock A.M., after having first given due notice of the time and place of such sale according to law; at which sale all the right, title, interest and claim of said judgment debtor in and to the said premises, were struck off and sold to the said party of the second part for the sum of *FIVE THOUSAND SEVEN HUNDRED FORTY and 05/100---- DOLLARS* lawful money of the United States of America, the said party of the second part being the highest bidder, and that being the highest sum bid for the same, whereupon the said Sheriff, after receiving from the said purchaser the said sum of money so bid as aforesaid, gave to the said party of the second part such certificate of said sale as by law directed to be given, and a duplicate of such certificate was duly filed by the said Sheriff in the office of the Recorder of the County of Maricopa.

And whereas, six months after said sale have expired without any redemption of the said premises to made, and provided for, and in consideration of the said sum of money, to him in hand paid as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold,

conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the second party, and to his heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor, JOSEPHINE E. HANNER had on the said 2nd day of June, A.D. 1959, or at any time afterwards, or now has in and to all that certain lot, piece or parcel of land situate, lying and being in the said County of Maricopa, State of Arizona, and bounded and particularly described as follows, to-wit:

Lots 17, 18, 19 and 20 Wells Place, Maricopa County, Arizona, TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining.

TO HAVE AND TO HOLD the said premises with the appurtenances unto said party of the second part, his heirs and assigns forever, as fully and absolutely as the said Sheriff can, may, or ought to, by virtue of the said writ, and of the Statute in such cases made and provided, grant, bargain, sell, convey and confirm the same.

IN WITNESS WHEREOF, the Sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

L. C. BOIES (Seal)
Sheriff of the County of Maricopa
State of Arizona

STATE OF ARIZONA }
SS:
COUNTY OF MARICOPA }

On this 27th day of March, 1962, personally appeared before me, the undersigned authority, within named L. C. BOIES, Sheriff of the County of Maricopa, State of Arizona, known to me to be the person described in and whose name is subscribed to the within instrument, and he, acknowledged to me that he, as such Sheriff of said County, executed the same for the purpose and consideration therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal of office at my office in the County of Maricopa, State of Arizona, the day and year in this Certificate first above written.

Mort H. Baskin
Notary Public in and for the County of Maricopa, State of Arizona. My commission Expires April 30, 1965.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA.

CECIL DE MARCUS, also known as HAROLD DE MARCUS, and RACHEL DE MARCUS, his wife,

Plaintiffs,

vs.

BETTY JO KNIGHT, Unknown Heirs of BETTY JO KNIGHT, if deceased, ARTHUR E. HANNER, Unknown Heirs of ARTHUR E. HANNER, if deceased, JOSEPHINE E. HANNER, formerly known as JOSEPHINE E. KNIGHT, Unknown Heirs of JOSEPHINE E. HANNER, if deceased GLENN A. NESBITT, Unknown Heirs of GLENN A. NESBITT, if deceased, GLADYS BARND, Unknown Heirs of GLADYS BARND, if deceased,

Defendants.

No. 145140

COMPLAINT

ACTION FOR QUIET TITLE

(Filed 12-17-62)

COMES NOW the above named plaintiffs by and through

their attorneys, Vanlandingham & Stoneman, for the cause of action in the above entitled matter states as follows:

I

That the plaintiffs and defendants are residents of Maricopa County, Arizona, and that certain real property which is the subject of this suit and hereinafter described is situated in Maricopa County, Arizona.

II

That the above named plaintiffs are the true and lawful owners of that certain real property situated in Maricopa County, Arizona, more particularly described as follows:

Lots 17, 18, 19 and 20, Wells Place, according to Book 40 of Maps, page 47, records of Maricopa County, Arizona.

III

That the above named defendants and each of them claim some color of title to the above described real property, which claims constitute a cloud on plaintiffs' title to said property, but that all such claims and each of them is inferior to the title held by these plaintiffs and in fact are not real and valid claims whatsoever.

IV

That on or before the 17th day of November, 1962, more than 20 days prior to filing this action, these plaintiffs demanded a quitclaim deed from each of the above named defendants pursuant to Section 12-1103 A.R.S. and tendered therewith the sum of Five Dollars ($5.00) each as required by said statute and all of said defendants have failed or refused to execute said quitclaim deeds.

V

That plaintiff has been required to retain legal counsel and institute this action and that the reasonable costs as and for attorneys fees should be adjudged against defendants as part of the cost of this action.

WHEREFORE plaintiffs pray:

1. That the defendants and each of them be required to set forth all their adverse claims to the property above described. 2. That the same be adjudged null and void, and that they be decreed to have no estate or interest in, or lien or encumbrance, upon said property. 3. That this title be quieted in the plaintiffs as to all adverse claims, and that defendants be forever debarred and enjoined from further asserting the same. 4. That the plaintiffs recover possession of the premises described. 5. For judgment for plaintiffs and against the above named defendants and each of them for reasonable costs and attorney fees incurred in this action and for such other further relief as the court may deem just and equitable.

VANLANDINGHAM & STONEMAN
By /s/ MICHAEL H. LYNN

STATE OF ARIZONA }
County of Maricopa } SS.

Comes now Cecil DeMarcus, being first duly sworn on oath, states that he is the plaintiff for the above entitled action, that he has read the foregoing complaint, knows the contents thereof and that it is correct to the best of his knowledge.

/s/ CECIL DeMARCUS

Subscribed and sworn to before me this 17th day of December, 1962.

/s/ RUTH I. PATTERSON
Notary Public

(TITLE OF COURT AND CAUSE)

SEPARATE ANSWER OF DEFENDANT, JOSEPHINE E. HANNER formerly known as JOSEPHINE E. KNIGHT
(Filed 1/17/63)

COMES NOW the defendant, JOSEPHINE E. HANNER,

formerly known as JOSEPHINE E. KNIGHT, by and through her attorney, JOHN M. LEVY, and for no other defendant, and for her answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

I

Admits Paragraph I of said complaint.

II

These defendants, answering Paragraph II of plaintiffs' complaint, denies said paragraph, and the whole thereof.

III

Answering Paragraph III of plaintiffs' complaint, admits that this defendant claims some color of title to the property described in plaintiffs' complaint and denies the remainder of the allegations in said paragraph and in this connection alleges that the property described in said complaint is held in joint tenancy with Betty Jo Knight, her daughter, which deed to Lot 17 was executed on September 15, 1948 from John L. Wells and Vivian Cleata Wells to Betty Jo Knight and Josephine E. Knight, and recorded September 16, 1948 in Docket 273, at pages 431 and 432; the deed to lot 18 being dated March 15, 1948, being a joint tenancy deed, recorded July 10, 1948 in Docket 242 at pages 501-2; and the joint tenancy deed to Lots 19 and 20 being dated July 4, 1948 and recorded July 10, 1948 in Docket 242, pages 507-8, in the Office of the Maricopa County Recorder.

IV

This defendant admits Paragraph IV of plaintiffs' complaint; admits that this defendant has failed and refused to accept said quit claim or accept the sum of $5.00 for the reason that she is the owner of said property mentioned in plaintiffs' complaint, in joint tenancy with her daughter, Betty Jo Knight, as aforesaid.

Answering Paragraph V of plaintiffs' complaint, this defendant alleges that she has no information or belief sufficient to form a belief as to any or either of the allegations contained in said Paragraph V and upon these grounds denies same.

V

FOR A FURTHER SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

I

That this answering defendant claims color of title to the property described in plaintiffs' complaint by virtue of the fact that the same is owned by her in joint tenancy with Betty Jo Knight, her daughter, in which the deed to Lot 17 was executed by John L. Wells and Vivian Cleata Wells, on September 15, 1948 to Betty Jo Knight and Josephine E. Knight, and recorded September 16, 1948 in Docket 273, at pages 431 and 432; the deed to Lot 18 being dated March 15, 1948, also a joint tenancy deed, recorded July 10, 1948 in Docket 242 at pages 401-2; and the joint tenancy deed to Lots 19 and 20 being dated July 5, 1948 and recorded July 10, 1948 in Docket 242, at pages 507-8, in the Office of the County Recorder of Maricopa County, Arizona.

II

That since plaintiffs in this action saw fit to name this defendant in the quiet title action, this defendant was compelled to engage an attorney to defend her in said action and has engaged JOHN M. LEVY, a practicing attorney in all courts of the State of Arizona to defend her and that she has incurred an expense of reasonable attorney fees and costs, which should be adjudged against the plaintiffs.

III

That it appears to this defendant that plaintiffs in this action were not a party in Cause No. 49044 in the Superior Court of Maricopa County, State of Arizona, in which action Arthur E. Hanner is plaintiff and Josephine E. Hanner is the defendant and that any judgment or execution issued in favor of these plaintiffs in said action is null and void and of no effect, and that plaintiffs in the above-entitled and numbered cause have no legal or beneficial interest in the property described in plaintiffs' complaint and that any execution issued in favor of the

above-named plaintiffs in said Cause No. 49044 should be set aside and held for naught and that any execution issued by the above-named plaintiffs in that action was wrongfully and unlawfully obtained; that no notice of any kind was given to Josephine E. Hanner, formerly known as Josephine E. Knight, or Betty Jo Knight.

IV

This defendant demands trial by jury.

/s/ JOHN M. LEVY
ATTORNEY FOR DEFENDANT.
JOSEPHINE E. HANNER formerly
known as JOSEPHINE E. KNIGHT
525 Greater Arizona Sav. Bldg.
Phoenix, Arizona

STATE OF ARIZONA }
} SS:
COUNTY OF MARICOPA }

JOSEPHINE E. HANNER, formerly known as JOSEPHINE E. KNIGHT, being first duly sworn upon oath deposes and says:

That she is one of the defendants in the above-entitled and numbered cause and makes this verification in her own behalf and for no other defendant; that she has read plaintiff's complaint on file herein and the above and foregoing answer thereto and knows the contents thereof; that the matters alleged in said complaint and denied above are untrue; that the matters alleged in the above answer are true of her own knowledge except those which are alleged to be upon information and belief, and as to such matters, she believes them to be true.

/s/ JOSEPHINE E. HANNER
JOSEPHINE E. HANNER, formerly
known as JOSEPHINE E. KNIGHT

Subscribed and sworn to before me this 16th day of January, 1963.

/s/ ELIZABETH CAIN
Notary Public

My commission expires
August 4, 1966

COPY MAILED this 17th day of January,
1963 to VAN LANDINGHAM & STONEMAN,
Attorneys for Plaintiffs
Suite 202 — 5800 North 19th Avenue,
Phoenix, Arizona

JOHN M. LEVY
Attorney for Defendant,
Josephine E. Hanner, formerly known
as Josephine E. Knight

(TITLE OF COURT AND CAUSE)
MOTION FOR SUMMARY JUDGMENT
(Oral Argument Requested)
(Filed 7/25/63)

COMES NOW the above-named Plaintiffs, by and through their attorneys, VAN LANDINGHAM & STONEMAN, and hereby moves the Court to grant Plaintiffs Summary Judgment against the Defendants and each of them as prayed for in Plaintiffs' Complaint, for the reason and on the grounds that the pleadings on file and the affidavits and exhibits attached hereto show that there is no genuine issue as to any material fact and that the moving party is entitled to Judgment as a matter of law (pursuant to Rule 56 of the Arizona Rules of Civil Procedure).

VANLANDINGHAM & STONEMAN

/s/ JOHN VANLANDINGHAM
John Vanlandingham
Attorneys for Plaintiffs
5800 North 19th Avenue
Suite 202
Phoenix, Arizona

MEMORANDUM OF POINTS AND AUTHORITIES

The facts in this case may be summarized as follows: This

is an action for quiet title brought by the Plaintiff, Cecil DeMarcus, also known as Harold DeMarcus. Each of the Defendants have appeared and answered, alleging certain defenses. However, it is the position of the Plaintiff that none of these defenses raised by the Defendants constitute any legal defense and that the pleadings on file together with the affidavits show that there is no genuine issue as to any material fact; and that the Plaintiff is entitled to judgment as a matter of law.

To set the background for this position, we herein set out certain facts which we believe are not and cannot be controverted, and therefore must be taken as true, along with the matters of law by which the Plaintiff is entitled to judgment.

There was a divorce case in the Superior Court, in and for the County of Maricopa, No. 49044, "Arthur E. Hanner, Plaintiff, vs. Josephine E. Hanner, formerly known as Josephine E. Knight, Defendant", both of whom are defendants in this action. This was a greatly contested divorce matter, wherein, on stipulation of Counsel for both parties, the Court appointed a Special Master, one Cecil DeMarcus, Certified Public Accountant (the Plaintiff in this action), see Exhibit A, page 2, line 14 through 16. Cecil DeMarcus, CPA, as Special Master undertook and completed his duties. In the final judgment entered June 21, 1959, the Court ordered the payment to Cecil DeMarcus, his fees as Master, with the provision that these fees should be paid by the Defendant in that case, Josephine E. Hanner, formerly known as Josephine E. Knight, and that if not done within sixty (60) days after rendition of said Judgment, that execution should issue as provided by the Arizona Rules of Civil Procedure, Rule 53(A), (See Exhibit A, page 14, line 1 through 17),

"The Court in any action to be tried without a jury may appoint a special master therein. As used in these Rules, the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the Court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the Court as the Court may direct. The Master shall not retain his report as security for his com-

pensation but when the party ordered to pay the compensation allowed by the Court does not pay it, after notice and within the time prescribed by the Court, the master is entitled to a writ of execution against the delinquent party."

Thereafter, Cecil DeMarcus made demand upon the Defendant, Josephine E. Hanner, formerly known as Josephine E. Knight, for the payment of the Master's fees. Since the fees were not paid, execution issued on September 18, 1959. Levy was made on the real property concerned herein, to wit: Lots 17, 18, 19 and 20, WELLS PLACE, which had been set aside as separate property to the said Josephine E. Hanner, formerly known as Josephine E. Knight, and notice of sale of execution was duly given as required by law, as shown by the records in Case No. 49044, of which this Court can take judicial notice.

Thereafter, said property, Lots 17, 18, 19 and 20, WELLS PLACE, was sold at sheriff's sale as required by law on October 29, 1959, at which time the Plaintiff herein, Cecil DeMarcus, was the highest bidder and received a Certificate of Purchase. On April 2, 1962, almost two years after the redemption period had run, and no redemption made or attempted, the Sheriff issued his deed to the Plaintiff herein, Cecil DeMarcus, for the above-described real property. (See Exhibit B, attached hereto and made a part hereof)

All of these facts are matters of record in Case No. 49044, and cannot now be denied, and therefore must be taken as true. This action, now before the Court was commenced to quiet title to said Lots 17, 18, 19 and 20, WELLS PLACE, in Cecil DeMarcus, aka Harold DeMarcus and Rachel DeMarcus, his wife * * *

Respectfully submitted,

VANLANDINGHAM & STONEMAN

By JOHN VANLANDINGHAM
John Vanlandingham
Attorneys for Plaintiffs
5800 North 19th Avenue, Suite 202
Phoenix, Arizona

(TITLE OF COURT AND CAUSE)
MEMORANDUM IN RESPONSE TO
MOTION FOR SUMMARY JUDGMENT
(ORAL ARGUMENT REQUESTED)
(Filed 8/14/63)

Plaintiffs claim title to the property in question by virtue of a sale thereof made under a writ of execution issued out of the cause entitled "Hanner vs. Hanner" and numbered 49044 of the Superior Court of this county and state.

"Plaintiff must succeed on the strength of his own title and not on the weakness of that of his adversaries." *Berger vs. Bhend,* 79 A. 173; 285 P.2d 751, and prior Arizona cases

Plaintiffs rely upon Rule 53(A), RULES OF CIVIL PROCEDURE, which upon its face indicates that a writ of execution may issue to assist a Master in recovering his fees or compensation. They apparently assume that the rule is self-executing since plaintiffs were not a party in the case of Hanner vs. Hanner. Normally, an execution in this state only issues after a judgment in favor of the party seeking the writ. It is defined as a judicial writ issuing from the Court where the judgment is rendered, directed to an officer thereof and running against the body or goods of a party by which the judgment of the Court is enforced. *33 C.J.S. Sec. 1, page 133.*

"Except as may be otherwise provided by Statute, an execution cannot lawfully issue other than on a final judgment or decree pronounced by a competent Court which had determined the respective rights and liabilities of the parties to the action."

33 C.J.S. §5, Pg. 136

"An execution to be valid must have a valid judgment to support it."

33 C.J.S. §8, Pg. 141

"The fees of a Referee or Master are 'costs' to be fixed by the Court and taxed by the Clerk at the sum fixed."

U.S. vs. Bethlehem Steel Corp.
26 F.Supp. 259

In tracing the source of Rule 53(A), we find the revised Code of Arizona, 1928, Sec. 3880, provided as follows:

"3880. Compensation to Referee and Auditor. — The Court shall award such compensation to a Referee or Auditor as the parties may agree upon, and direct the payment according to the agreement of the parties. If no agreement be made, the Court shall fix the compensation of the Referee or Auditor and direct the manner of payment thereof, and the same shall be allowed and taxed as costs." [R.S. 1913, §671; rev., R.C. 1928, §3880.]

With the above authorities in mind, we seriously question whether Rule 53(A) is self-executing in this state, its having been the practice in this state to recover costs of an action through the successful party to the action for the benefit of the person who is entitled to the costs.

In addition to the assumption on the part of plaintiffs that Rule 53(A) is self-executing and that plaintiffs in this action can seize property and sell it under a writ of execution issuing from an action to which they were not parties, they further assume that plaintiffs strictly followed the Rule and gave to the defendants the "notice" required by the Rule. Plaintiffs pass this over lightly in their memorandum with the statement that they made demand upon the defendant, Josephine E. Hanner, formerly known as Josephine E. Knight, and plaintiff, Cecil DeMarcus, aka Harold DeMarcus, in his deposition admitted that all he did was to make a demand. He did not give any notice to the defendant that he would follow the strict requirements of the Rule and have a writ of execution issue if his compensation were not paid. Defendants deny that any such notice was given and therefore we do have a material issue of fact very vital in this case. Unless plaintiffs can prove a strict compliance with the Rule, they certainly could not acquire any title to the property in question. * * * *

The Court should also take judicial notice of the fact that the case of Hanner vs. Hanner is on appeal to the Supreme Court of the State of Arizona and has not been finally determined,

one of the issues on such appeal being whether the plaintiff or the defendant should pay the Master's fees. The Master's fees being costs, they would pend the determination of the case, as costs generally do.

Cecil DeMarcus, aka Harold DeMarcus, one of the plaintiffs, is a certified public accountant and had offices on the fifth floor of the Greater Arizona Savings Building during the time he had the writ of execution issued on September 18, 1959, and for some considerable time thereafter. Said plaintiff was constantly in touch with John M. Levy, one of the attorneys for Josephine E. Hanner, aka Josephine E. Knight, since he had to pass the door of Mr. Levy's office to get to his own on the same floor, and conversed with Mr. John Levy, in the presence of Mrs. Knight, and never at any time did the said Cecil DeMarcus make any mention of issuing an execution against the separate property of Josephine E. Hanner, aka Josephine E. Knight. In fact, it was a daily and sometimes several times daily occurrence that Cecil DeMarcus would be talking to the said John M. Levy from time to time until the said Cecil DeMarcus moved from the Greater Arizona Savings Building about the first of February, 1962, and even thereafter, the said Cecil DeMarcus met John M. Levy in Lindy's Restaurant on the ground floor of said building, and never at any time did he mention as to issuing a writ of execution. * * * *

JOHN M. LEVY
EMMETT R. FEIGHNER

By JOHN M. LEVY
ATTORNEYS FOR DEFENDANTS,
JOSEPHINE E. HANNER, aka
JOSEPHINE E. KNIGHT and
BETTY JO KNIGHT

(TITLE OF COURT AND CAUSE)
AFFIDAVIT OF JOSEPHINE E. HANNER and BETTY JO KNIGHT
(Filed 9/17/63)

STATE OF ARIZONA
} SS:
COUNTY OF MARICOPA

JOSEPHINE E. HANNER and BETTY JO KNIGHT, being first duly sworn upon oath depose and say:

Affiants state they are defendants in the above entitled action, and both are the record owners of the real property in question, to-wit:

Lots 17, 18, 19 and 20, WELLS PLACE, Maricopa County, State of Arizona,

said property being held in joint tenancy with rights of survivorship, which have been duly recorded in the office of the County Recorder of Maricopa County, State of Arizona, as set out in Page 5 of Defendants' Memorandum in Response to Motion for Summary Judgment.

Affiants allege that at no time did the plaintiffs make due *demand* upon these affiants for the payment as set out in the affidavit of Cecil DeMarcus, nor did these affiants receive any *notice* from the said Cecil DeMarcus or his agents or his attorney as required by Rule 53(A) Rules of Civil Procedure for the Superior Courts of the State of Arizona, which is a material issue of fact as to whether the *notice* required by said Rule 53(A) was given to these defendants by the plaintiff.

Affiants further allege that at no time did they receive any Notice from the Sheriff of Maricopa County, State of Arizona as to any execution issued out of the above entitled Court and did not receive any notice as to any Sheriff's sale of said Lots 17, 18, 19 and 20, Wells Place, Maricopa County, State of

Arizona; that the plaintiff, Cecil DeMarcus, knew at all times that the case of Hanner vs. Hanner was pending on appeal in the Supreme Court of the State of Arizona, and he also knew that one of the issues on such appeal was whether the plaintiff or the defendant should pay the master's fees, the master's fees being costs they would pend the determination of the said case on appeal, as costs generally do.

Affiants allege that the property in question is vacant land, and they have gone by the said property every day for many years, and at no time did affiants see any notices of Sheriff's sale on said property, and affiants further allege that they have paid all taxes from the years 1948 to 1960 on said property known as Lots 17, 18, 19 and 20, Wells Place, Maricopa County, Arizona.

/s/ JOSEPHINE E. HANNER

/s/ BETTY JO KNIGHT

Subscribed and sworn to before me this 16th day of September, 1963 by Josephine E. Hanner and Betty Jo Knight.

JOHN M. LEVY
Notary Public

My commission expires
January 17, 1967

Mailed a copy to Vanlandingham
& Stoneman

Attorneys for Plaintiffs, this
17th day of September, 1963
JOHN M. LEVY
Attorney for Defendants

(TITLE OF COURT AND CAUSE)

JUDGMENT

(Filed 11/18/63)

The above entitled matter came on for hearing on the 11th day of October, 1963, on Plaintiff's Motion for Summary Judgment. Plaintiff being present through their attorneys, Vanlandingham, Stoneman & Lynn, and the Defendants Barnd, Nesbitt, Knight and Josephine Hanner being present by their attorney, Emmett Feighner, Defendant Arthur E. Hanner being represented by Attorney James Struckmeyer.

WHEREUPON, Counsel were heard and the evidence presented, considered and the matter taken under advisement.

NOW, THEREFORE, the Court finds that there is no genuine issue as to any material fact and that the Plaintiffs are entitled to judgment as a matter of law, and that Plaintiffs' Motion for Summary Judgment is granted; that title to the within described real property is quieted in Plaintiffs, Cecil A. DeMarcus, also known as Harold DeMarcus and Rachel DeMarcus, his wife, to-wit:

> Lots 17 and 18, Wells Place, according to Book 40 of Maps, page 47, records of Maricopa County, Arizona;
> Lots 19 and 20, Wells Place, according to Book 40 of Maps, page 47, records of Maricopa County, except the West 25 feet thereof;

that the Plaintiffs recover possession of the premises herein described; that the adverse claims of the Defendants and each of them in the herein described real property are adjudged null and void, and that said Defendants are decreed to have no estate or interest in, or lien or encumbrance upon, said real property; that Defendants and any claimant claiming by, through or under said Defendants, or any of them, are forever barred and enjoined from further asserting any such claims; and that judgment is granted for Plaintiffs and against the Defendants, Betty Jo Knight, Josephine E. Hanner, Glenn A. Nesbitt and Gladys Barnd, and each of them, for the sum of Two Thousand Dollars

($2,000.00), as and for Plaintiffs' Attorneys' fees, for costs of suit herein incurred.

DONE IN OPEN COURT this 18th day of November, 1963.

JACK D. HAYS
JUDGE

(TITLE OF COURT AND CAUSE)
MOTION FOR NEW TRIAL
(ORAL ARGUMENT REQUESTED)
(Filed 11/26/63)

COME NOW the defendants, BETTY JO KNIGHT, JOSEPHINE E. HANNER, formerly known as Josephine E. Knight, GLENN A. NESBITT and GLADYS BARND, by and through their attorneys, JOHN M. LEVY and EMMETT R. FEIGHNER, and move the Court for an order vacating and setting aside the findings and judgment made, filed and entered herein, and that a new trial be granted upon the following grounds, to-wit:

The Judgment is not justified by the evidence and is contrary to law, because:

* * * * 5. Rule 53(A), upon which plaintiffs rely, and upon which they rely as a foundation for their alleged chain of title, is not self-executing and requires some action and proceedings by the claimant thereunder establishing the fact of notice and expiration of time fixed by the judgment and whereby the master would become a party to the action; otherwise, it would violate Article II, Section 5 of the Constitution of Arizona and Amendment V of the Constitution of the United States, denying the right to deprive a person of property without due process of law.

6. Rule 53(A), insofar as it provides for the issuance of an execution to enforce the payment of master's fees, is so vague and uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application and thereby violates Article II, Section 4 of the Constitution of Arizona and

Amendment V of the Constitution of the United States denying the right to deprive a person of property without due process of law. * * * *

JOHN M. LEVY—EMMETT R. FEIGHNER

By EMMETT R. FEIGHNER
Attorneys for Defendants, Betty Jo Knight, Josephine E. Hanner, Glenn A. Nesbitt and Gladys Barnd

(TITLE OF COURT AND CAUSE)

NOTICE OF APPEAL

(Filed 1/18/64)

NOTICE IS HEREBY GIVEN that the defendants, BETTY JO KNIGHT, JOSEPHINE E. HANNER, formerly known as Josephine E. Knight, GLENN A. NESBITT and GLADYS BARND, in Cause No. 145140, Maricopa County, State of Arizona, appeal to the Supreme Court of the State of Arizona from that judgment against said defendants, rendered therein on the 18th day of November, 1963, filed and docketed in the Office of the Clerk of the Superior Court of Maricopa County, State of Arizona, on the 18th day of November, 1963, wherein judgment was rendered in favor of said plaintiffs and against said defendants in said cause, and from the whole of said judgment, and from the order overruling and denying said defendants' Motion for New Trial, which Motion was made and filed in the Office of the Clerk of the Superior Court of Maricopa County, Arizona, on the 26th day of November, 1963, and which order overruling said defendants' Motion for New Trial was made and

entered in said cause on the 6th day of December, 1963, and from all the intermediate orders and rulings of the Court in said cause.

DATED at Phoenix, Arizona, this 13th day of December, 1963.

JOHN M. LEVY—EMMETT R. FEIGHNER

By EMMETT R. FEIGHNER
ATTORNEYS FOR DEFENDANTS BETTY JO KNIGHT, JOSEPHINE E. HANNER, formerly known as Josephine E. Knight, GLENN A. NESBITT and GLADYS BARND

IN THE

Supreme Court of the State of Arizona

In Division

BETTY JO KNIGHT, et al, Appellants, CECIL DEMARCUS, et ux, Appellees.		No. 8228

Appeal from the Superior Court of Maricopa County
Honorable Jack D. H. Hays, Judge
Affirmed.

JOHN M. LEVY, Phoenix
EMMETT R. FEIGHNER, Phoenix (deceased)
Attorneys for Appellants.

VANLANDINGHAM, STONEMAN & LYNN, Phoenix,
MAX M. KLASS, Phoenix
Attorneys for Appellees.

BERNSTEIN, Chief Justice

Plaintiff, Cecil DeMarcus, brought a quiet title action in the Superior Court of Maricopa County. From an order granting plaintiff a summary judgment, defendants appeal.

Cecil DeMarcus acted as special master in a divorce action involving appellant Josephine Hanner, Superior Court case No. 49044, and was awarded a fee of $5,072.10 for his services. Rule 53(a), Rules of Civil Procedure, A.R.S. 16. This award was subsequently affirmed by this court in Hanner v. Hanner, 95 Ariz. 191, 388 P.2d 239,[1] in which we held that the trial

[1]This decision not being rendered until after the quiet title action had been brought in the Superior Court. (Footnote in the original)

court was properly acting within its discretion in ordering Josephine Hanner, defendant both in the divorce action and the present quiet title action, to pay the master's fee.

The fee had been set by the lower court in June 1959, but remained unpaid in September of the same year when the plaintiff, DeMarcus, secured an execution against the property presently in question. A sale following the execution was made in October and the property was purchased by the plaintiff for a price approximately equal to the judgment.

In April of 1962 a sheriff's deed was issued to DeMarcus, and it is on the basis of this deed that he now seeks to quiet title in the described property. The named defendants are Josephine Hanner, Betty Jo Knight (daughter of Josephine Hanner) and two creditors, Glenn Nesbitt and Gladys Barnd who claim a lien interest in the land. On plaintiff's motion, the trial court granted him a summary judgment and subsequently denied the defendants' motion for a new trial.

Rule 56(e), Rules of Civil Procedure, A.R.S. 16 provides that once a motion for summary judgment has been made and supported, the adverse party must answer in detail as specific as that of the moving papers or else summary judgment will be entered against him. Because plaintiff's deposition and affidavits presented a prima facie case for quiet title (infra), Lujan v. MacMurtrie, 94 Ariz. 273, 383 P.2d 187, and because defendants Nesbitt and Barnd failed to answer with opposing affidavits, we conclude that summary judgment was properly entered against them. We turn now to a consideration of the summary judgment granted against defendants Josephine Hanner and Betty Jo Knight.

Summary judgment may be properly granted when, one, the pleadings, depositions, and affidavits present no genuine issue as to any material fact and, two, the moving party is entitled to a judgment as a matter of law. Rule 56(c), Rules of Civil Procedure, A.R.S. 16. Defendants present several reasons why they think summary judgment was improvidently granted in the present case, these being discussed below.

First, defendants contend that plaintiff's affidavit was defective because it fails to state it was made upon his personal knowledge and because neither the affidavit nor the attached exhibits were sworn to or certified. We have previously held that when, as here, the contents of an affidavit show that its material parts are statements of the affiant's personal knowledge, it is unnecessary to specifically state that the statements therein are a part of the affiant's personal knowledge. Hoffer v. Wetzel, 95 Ariz. 384, 390 P.2d 911.

Likewise we held in Hoffer v. Wetzel, supra, that failure to certify or swear to exhibits or affidavits is not a jurisdictional defect and that an objection in this respect may be waived. Since no objection for failure to comply with this required formality was raised while the lower court was considering the motion for summary judgment, we deem the objection to have been waived. Moreover, it would be purposeless, under the circumstances, to send the case back to the trial court for the sole purpose of having plaintiff correct the errors in his affidavit. See Colby v. Bank of Douglas, 91 Ariz. 85, 370 P.2d 56.

Secondly, defendants contend that there were several issues of fact that should properly have prevented the summary judgment. First of these issues advanced by the defendants is whether the plaintiff had given defendants "notice" of his intention to execute on the property in question. They argue that Rule 53(a), Rules of Civil Procedure, A.S.R. 16 imposes such a notice requirement. We disagree. The pertinent portion of that rule is as follows:

> ". . . (W)hen the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

A cursory reading of the rule makes it evident that the word "notice" refers to a notice to the debtor of his obligation and that the rule does not then further require a notice of an intent to execute, once notification of the judgment is properly given. Therefore whether or not defendants had notice of the intended

execution is immaterial and does not stand in the way of a summary judgment. Maloy v. Taylor, 86 Ariz. 356, 346 P.2d 1086.

Defendants further contend that the question of whether the property executed was held in joint tenancy between defendants Josephine Hanner and Betty Jo Knight, was a material issue of fact. This matter could be material only to Betty Jo Knight who was not a party to the Hanner v. Hanner action, supra, and she specifically disclaimed, under oath, any interest in the property. The following is taken from the Supplemental Abstract of Record:

"Q. Do you have a claim or did you ever claim any interest in those lots?

"A. (Betty Jo Knight): No, sir."

In addition the following comes from an examination of Josephine Hanner:

"Q. Mrs. Hanner, your daughter testified she has no interest in those lots, isn't that correct?

"A. You mean that she bought the interest, or something of that sort?

"Q. You heard her testimony that she had no interest in that property described in that Exhibit?

"A. She would if I died; they would belong to her.

"Q. But at the moment as far as you are concerned and she is concerned--

"A. They are mine, my lots."

Rule 53(a), supra, providing for the appointment and compensation of special masters is clear in its terms. If the compensation is not paid, the rule provides a means by which payment may be secured. We disagree with defendant's contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or Federal Constitutions.

Neither do we agree with defendants' claim that such compensation is in the nature of "costs" and that payment thereof should be suspended pending appeal. If the defendants wished to

stay execution of the judgment rendered against Josephine Hanner, pending appeal, this could easily have been accomplished by filing a supersedeas bond in accordance with Rules 62(d) and 73(k), Rules of Civil Procedure, A.R.S. 16. This, however, was not done.

We conclude that the plaintiff acted entirely within his rights as prescribed by statute. He was awarded a reasonable compensation for his services and was not paid. As a result, he sought relief in a manner provided by statute for persons in his exact position. Similarly, we conclude under the circumstances, contrary to defendants' urgings, that the plaintiff did not act adversely to notions of equity in executing against the particular property in question, despite indications that it was worth considerably more than the judgment. In the first place, it was reasonable for the plaintiff to assume that the property in question was the only suitable separate property of Josephine Hanner upon which to execute, and that it was naturally preferable to execute against it as opposed to property she held in community. In the second place, defendant was nevertheless free, for a period of six months, to exercise her statutory equity of redemption as a means of preserving her interest in the property. A.R.S. §§12-1281 — 12-1289. Again, defendant neglected to use the appropriate remedy.

Judgment affirmed.

CHARLES C. BERNSTEIN, Chief Justice

CONCURRING:

ERNEST W. MCFARLAND, Vice Chief Justice

JESSE A. UDALL, Justice

IN THE SUPREME COURT
OF THE
STATE OF ARIZONA

BETTY JO KNIGHT, et als, Appellants, vs. CECIL DeMARCUS, et ux, Appellees.	No. 8228 MOTION FOR REHEARING

COMES NOW the Appellant by her attorneys and respectfull moves that the Court grant a rehearing in this matter or, in the alternative, remand this matter back to the trial court for a hearing on the merits and, further in the alternative, that this Court reverse its original decision and find for the Appellant or for such other relief as to the Court seems fair and equitable under the circumstances.

This motion is based on three major points which, it is submitted, this Court failed to consider fully, namely (1) the failure of the master to give notice of his intention to execute, (2) the defects in the levy itself, and (3) the improvident granting of the motion for summary judgment.

In respect to point (1) above, we have carefully read the case of *Maloy* v. *Taylor,* 86 Ariz. 356, 346 P.2d 1086, cited by the Court as authority for the fact that notice of an execution does not have to be given by the master, and with all due respect to the Court, we cannot find any place in the cited case that gives authority for this position.

Counsel for Appellants have made a thorough search for a case in point and call to the Court's attention the case of *Cutting* v. *Van Fleet,* 252 Fed. 100, which was decided when Equity Rule 68 was in force. As appears from the reading of that case,

the phrase "attachment for the amount against the party" means a body attachment. The Court held that the remedy is a contempt proceeding and that whether or not an order to show cause should first issue is one that rests in the discretion of the Court. In that case a copy of the order was mailed to Cutting's attorney and later the master, by letter, informed Cutting (the delinquent party) of the purpose of the order and that if not obeyed the Court would be asked to issue an attachment. Later the marshall served upon Cutting a duly certified copy of the order, and after that an attachment was issued, the order not having been obeyed. The Court concluded that discretion had not been abused for the Appellant had due notice and had made his appearance to show cause.

The nature of Equity Rule 68 is explained in this quote from *Cutting* v. *Van Fleet, supra,* as follows:

> "The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samuel v. Dodd, 142 Fed. 68, 73 C.C.A. 254; Meeks v. State, 80 Ark. 579, 98 S.W. 278; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 215. Rule 68 has taken away the right of the master to hold his report until the payment of his compensation, and has given him in lieu thereof the right to the remedy of attachment. The power to order payment of the master's compensation is essential to the court's procedure, and to the timely exercise of its functions. In 13 C. J. 87, it is said:
>
> > 'Inasmuch as the constitutional prohibition of imprisonment for debt does not take away the power of the judge to commit to jail for contempt, imprisonment to compel compliance with the mandate of a court, order, decree, etc., is generally authorized if defendant is financially able to comply therewith.' "

Arizona Rule of Civil Procedure 53(a), which concerns the

master's compensation and his remedy to obtain it was taken directly from Federal Laws of Civil Procedure 53(a), which in turn is a modification of Federal Equity Rule 68 in its original form. When Arizona adopted the Federal Rules of Civil Procedure it adopted the history and construction of the rules. *Harbel Oil Co.* v. *Steele*, 80 Ariz. 368, 298 P.2d 789. Historically, equity's jurisdiction at common law was in personam and the Courts of Equity enforced their decrees by use of their power of contempt. 27 Am.Jur.2d, Equity Sec. 515, p. 533, notes 2, 4. Federal Equity Rule 68 is simply a statement of the common law which existed at the time Federal Rule 68 was adopted. The text of the rule is as follows:

> "The District Courts may appoint standing masters in chancery in their respective district (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court."

It was carried over into Federal Rule of Procedure 53(a) in the following language, here quoted in the pertinent part:

> ". . . The master shall not retain his report as security for his compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

Our first problem is to determine what change, if any, was intended when the Equity Rule was incorporated into Rule 53(a) with the modification noted. The most important change is the substitution of the remedy of execution for that of attachment. It clearly appears that the phrase "attachment against the party" as

stated in the Federal Equity Rule meant a body attachment. The Advisory Committee on Rules, as set out in U.S.C.A., in the Committee's Commentaries to Federal Rules of Civil Procedure 53 stated the following:

> "It seemed best to the committee to make no startling changes in the existing practice, (as to reference) so the subject is covered by a single rule which merely attempts to clear up some of the most important obscurities that now exist."

In reviewing the foregoing history of A.R.C.P. 53(a), however, Appellants conclude that this rule provides for a body execution as the remedy to be used by a master who is unpaid. As appears in the commentaries under Federal Rule 53 in U.S.C.A., the Committee thought it best not to make any startling changes in the practice. It is submitted that an intent to change the remedy from that of contempt to an execution on property would be a rather startling change, especially when made in such ambiguous language. The more reasonable interpretation is that the Committee intended to retain contempt as the remedy to be enforced by a body execution, and that the word "execution" was used in an attempt to modernize the language. This is indicated by the commentaries above quoted and the language of the Rule itself which reads in part "execution against the delinquent party." It says plainly that the execution is against the party. If the Committee had meant property it could easily have said so.

The direction for payment of the master's fees is an order of the court sitting as a court of equity as distinguished from a judgment. The master is not a party to the case, but the court does have the power to make an order for his protection in his fees, having given up his right to retain the report as security. *Cutting* v. *Van Fleet, supra.*

The court has substituted another and stronger remedy on his behalf. This is analagous to the order which a court is empowered to make requiring a husband to pay a wife's attorney fees. Rule 53 provides for a return of execution against the delinquent party, which we submit is the exclusive remedy available to the Referee and means a body execution.

Most assuredly, if the master's remedy is a body execution, due process requires that the delinquent party be given notice of intention to resort to that remedy before it is actually carried out, so that he my have an opportunity to show cause, if any there might be, why the execution should not be carried out, analagous to civil contempt. *Philippe* v. *Winslow Glass Cutters League of America,* 99 F. Supp. 369; *Parker* v. *United States,* 153 F.2d 66, 163 A.L.R. 379; Article 2, Section 4, Constitution of the State of Arizona; Amendment 5, Constitution of the United States of America.

Assuming for the sake of argument that the language contained in Rule 53(a) is construed to mean execution against the property of the delinquent party, the requirement of intention to execute is still inherent in Rule 53(a) by reason of its history. Again we observe that due process requires notice to a party before a body attachment is levied. This was the practice under Equity Rule 68. Inasmuch as Equity Rule 68 was taken into F.R.P. 53(a) and no startling changes made in the practice, it would appear that the Committee intended that the notice requirements remain the same even though the remedy might have been changed from that of contempt to that of execution against the property of the delinquent party.

This requirement makes sense in light of the relationship of the master in equity to the parties. While the master's duties require him to be absolutely impartial to either side, it also brings him into close and intimate contact with the parties in his endeavors to ascertain the nature of their financial affairs. The master conducts his investigation of the facts of the case on an informal and personal basis, which would normally lead the parties to an action to acquire a sense of trust and reliance in the integrity and fair dealings of the master. In this case the master had almost daily contact with Mrs. Hanner and her attorney, who officed on the same floor with the master. Furthermore, Mrs Hanner's attorney recommended the appointment of De Marcus as master, which indicates a high degree of confidence and trust in his integrity and sense of fairness. As the Court stated in *Citizens' State Bank* v.

McRoberts, 29 Ariz. 173, 239 Pac. 1028, 1030, ". . . we think in fairness such agents should have seen her personally and told her . . . what steps they contemplated taking against her property; somewhere along the line and before the right of redemption expired they should have informed her of the situation."

The failure of the master in this case to advise of his intention to run the execution or to advise Mrs. Hanner anywhere along the line that he had executed and that her rights were passing by default was not merely oversight. He had frequent opportunities to mention this to her and her attorney, but he consciously refrained from giving either of them any indication of the situation he had developed. Deposition of Cecil De Marcus, taken on August 1, 1963, 3:00 o'clock p.m., in the office of John M. Levy, Mr. Levy asking the questions, Mr. De Marcus making the answers:

"Q. Did you talk to Mrs. Hanner from time to time?
A. Yes.
Q. Before the judgment and after the judgment?
A. Yes.
Q. You talked to me about it?
A. Yes.
Q. In about September the 18th, 1959, about three months thereafter, you issued an execution against Lots 17, 18, 19, and 20, Wells Place?
A. If that is the date, I suppose that is right.
Q. And you were still officing in this building?
A. Yes.
Q. The Greater Arizona Savings & Loan Association Building?
A. Yes.
Q. Did you ever tell me about the execution?
A. I don't think so.
Q. Why?
A. Oh, I didn't want to get into any arguments or anything as to whether I should or should not do it.
Q. Did you ever talk to Mrs. Hanner about it?
A. No."

At this point the delinquencies of the master in failing to give notice of his intention to run the execution naturally brings us into consideration of the second major point of this brief, which concerns itself with the defects in the levy itself. There were two points in the levy at which fatal defects occurred. The first point was the failure of the sheriff to levy upon known or readily ascertainable personal property belonging to Mrs. Hanner before resorting to levy upon her real estate. *Blasingame* v. *Wallace,* 32 Ariz. 580, 261 Pac. 42; *Mortensen v. Berzell Investment Co.,* 2 Ariz. App. 571, 410 P.2d 689.

By reason of his position as officer of the Court and the peculiar nature of his duties under the terms of his appointment, the master in this case was undoubtedly acquainted with the financial affairs of Mrs Hanner. He knew, because it was his duty to determine such matters, that the four lots upon which he caused the sheriff to levy were worth by his own estimation $20,000, a sum between three and four times as much as the amount of his claim. He nevertheless caused all four lots to be put up for auction and bid them in at the sheriff's sale at the amount of his claim. He also knew by reason of his investigations of the affairs of Mrs. Hanner, pursuant to his appointment, that she had personal property available for levy and execution which far exceeded the amount of his claim. Yet it appears from the sheriff's return that a levy was made on the real property in question without first applying any part of Mrs. Hanner's personal property. According to the master's report to the court (see Schedule A-2), Mrs. Hanner owned contracts which were her sole and separate property, valued at $12,692.24. Furthermore, in Schedule A-3 there appear items such as owned furniture, an automobile, and bank accounts. Mrs. Hanner also owned at that time, as her separate property, a real estate and insurance business. All of these items were her personal property and were available for levy or execution. Moreover, after the decree of divorce was entered, Mrs. Hanner owned an undivided one-half interest (as a tenant in common with Mr. Hanner) in all of the personal property that was community property before the decree was entered. A.R.S. Sec. 25-318(d). Both the master and his attorney, who also represented Mr. Hanner in the divorce decree, were very much aware of the

availability of personal property belonging to Mrs. Hanner. Nevertheless they levied first on real property, even though the statute requires that the sheriff first resort to the judgment debtor's personal property in satisfaction of an execution. A levy on the personal property would have undoubtedly brought the whole matter to the attention of Mrs. Hanner and her attorney, because of the necessity of taking the personal property into possession of the sheriff, whereas the levy of an execution on her real property very likely would not come to her attention unless she happened to have a title search performed on that particular piece of real property, or unless she happened to be thumbing through the mountain of notices posted on the bulletin board at the Court House, or happened to be reading the notices in the Arizona Weekly Gazette, where such things are published —all of which are unlikely events.

The second point in which a fatal error in the levying execution occurred was when the sheriff failed to either make a demand upon Mrs. Hanner for payment of the amount of the judgment or, in the alternative, give her an opportunity to point out and designate property which she preferred having levied upon in satisfaction of the judgment in the event she failed to pay it.

A.R.S. Sec. 12-1562(B) provides that a judgment debtor point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make a levy on no other property. This particular section requires the sheriff to at least contact the judgment debtor to determine whether he has a preference as to which property is levied upon.

This is a practical construction by the Sheriff's Office, an administrative agency, of the obvious requirement of the statute relating to executions. "The practical construction of a statute, or the meaning publicly given it by contemporary usage, is usually presumed to be the true one. It should not be disturbed, disregarded, or overturned, especially where all other suggested

constructions are at least as doubtful as the practical one adopted, except for cogent or convincing reasons, such as its contravention of the constitution, or unless it is clear that such construction is erroneous and operates to defeat the manifest purpose of the statute and the intention of the legislature as expressed by the language employed." 50 Am.Jur. Statutes Section, pages 309-310.

Without this practical construction, our statutes relating to levy upon real estate and the execution of the same would be repugnant to the due process provisions of the Arizona Constitution and the United States Constitution.

A.R.S. Sec. 12-1562(B) doesn't mean a thing if the levying officer can, at his option, make the levy upon real estate without a reasonable attempt to locate the judgment debtor. In fact, it would not have been at all difficult to locate the judgment debtor in this case, because she was listed in the 1959 Mullen-Kille City Directory for Phoenix, Arizona, at page 1315, as Josephine E. Hanner, giving her address as Apt. 5, Patio del Palms, 3645 North 15th Place, telephone AM 5-3413. In addition to that, both the master and his attorneys were acquainted with her daughter Betty Jo Knight, who figured prominently in the contested divorce decree. She was listed in the Metropolitan Phoenix Telephone Directory for January 1958 and in the January 1960 Metropolitan Phoenix Telephone Directory on page 212 as Betty Jo Knight, telephone number AL 2-4572. Naturally it could also be presumed that she was also in the 1959 telephone directory. However, counsel was unable to obtain a copy of same, due to the fact the 1959 telephone directory from the files of the Telephone Company was subpoenaed for court proceedings in Pima County. If it is available before this matter is decided, we will submit the page number where she was listed in the 1959 edition. Also, the master had in his personal possession Mrs. Hanner's telephone number at all times. See Affidavit of Josephine Hanner. The master and his attorneys were acquainted with Mr. Levy, Mrs. Hanner's attorney, and his telephone number.

Section 12-1562(B) is the only assurance written into the

statute that a judgment debtor will receive notice of an impending levy.

It certainly must be presumed that the sheriff or deputy sheriff who levies on real estate is required to make demand on the judgment debtor for the amount of the judgment and to ask the judgment debtor to point out what property he desires sold to satisfy the judgment, for without this the levy and sale of real estate on judgment would be a vicious statute not giving to the judgment debtor due process allowed him under Art. 2, Sec. 4, Constitution of the State of Arizona, and under Amendment V of the Constitution of the United States of America. The Court is familiar with, and can take judicial notice of, the custom followed by the Sheriff's Office to contact the judgment debtor either by mail or in person and demand the amount of debt.

Besides the many other points we have discussed with relation to the levy of the execution and the sale thereunder, it should be borne in mind that this Court has, on the ground of inadequecy in the amount of bid with relation to value of property, set aside the sheriff's sale. *McCoy* v. *Brooks,* 9 Ariz. 157, 80 Pac. 365; *Citizens' Bank* v. *McRoberts,* 29 Ariz. 173, 239 Pac. 1028; *Redman* v. *White,* 85 Ariz. 82, 331 P.2d 1096.

On the basis of the lowest figure set by Appellee, the property is worth $20,000 which would mean 25% bid. On the figure contended by Mrs. Hanner, the property is worth $40,000.00, and the bid is 12½% of the true value. Affidavit of Josephine Hanner.

Mr. De Marcus was the master in equity in the case of *Hanner* v. *Hanner* and was an officer of the Court. He was placed in a position of trust and confidence, the duties of which gave him access to detailed and thorough knowledge of the financial affairs of the parties to the suit and placed him in a position which tended to engender a relationship of trust and confidence between him and the parties. As an officer of the court Mr. DeMarcus is charged with a standard of conduct in relation

to the parties in the action in the subject matter pending before the Court far more exacting than the standard of conduct imposed on a mere judgment creditor. It is submitted to the Court that the conduct on the master, in view of the light of all circumstances in the matter, fell far short of that required even of a mere judgment creditor. It is submitted that he took inequitable advantage of Josephine Hanner when he acquired her property worth many, many times the value of his claim under the circumstances of this case. It seems inconceivable that he could have honestly believed that this course of conduct was necessary to secure his compensation for acting as master in the case of *Hanner* v. *Hanner.*

At the least, the circumstances under which the levy was made raises a question of fact which ought to be tried out, which brings us to the final point—the propriety of granting summary judgment.

The Court's attention is called to *Elrick* v. *Rocklin,* 425 P.2d 103, March 15, 1967. The Court in that case laid down the strictest of requirements, and we quote:

> Rule 56(e) is explicit in requiring that 'Supporting and opposing affidavits shall be made on *personal knowledge,* shall set forth such *facts as would be admissible in evidence,* and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' (Emphasis added.) Obviously merely in conclusions of ultimate facts as are permitted in pleadings and conclusions of law do not meet this test. 6 Moore's Federal Practice (2nd ed. 1953) Sec. 56.22 at 2328, and cases there cited. We feel that the affidavit of the defendant, Dave MacMurtrie, falls short of these standards. *A proper affidavit may require more effort than the pleadings themselves and should be prepared with as much care as if the affiant were testifying in court. The crucial function of the summary judgment as a final judgment on the merits of the case requires that the affidavit meet with the requirements of the rule.* (Emphasis supplied.)
>
> * * *
>
> Because of the determinative effect of a summary judgment upon the rights of litigants, we feel the following words of

caution are appropriate:

> We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which the courts have been established. Denial of a trial on disputed facts is worse than delay. *** the district courts would do well to note that time has often been lost by reversal of summary judgments improperly entered.' Doehler Metal Furniture Co. 149 F.2d 130, 135." 94 Ariz. at 277, 278, 383 P.2d at 189, 190.

It would seem that the Elrick case is in conflict with the position which the Court has adopted in the instant case. The Court's attention is further called to the fact that there is no evidence at all in the affidavits concerning the reasonableness of the attorney fees of $2,000 awarded by the Court. This certainly is a question of fact which deserves to be tried out.

Betty Jo Knight in her affidavit states she has an interest as a joint tenant in the real property in question. Whatever she might have said in some other action to which she was a party no more than raises a question as to whether or not she does have an interest in the property. The quotations from the Hanner divorce case were a few statements taken out of context and were legal conclusions of a lay person. She could have been mistaken in that conclusion. The testimony in the Hanner divorce case seemed to be pointed toward the question of whether or not Betty Jo Knight paid money for an interest in the lots in question. It is submitted to the Court that one need not pay anything to obtain an interest in real propery, if it is acquired by gift. Mrs. Hanner in her testimony states certain conclusions which are contradictory in and of themselves. She states that Betty Jo Knight had no interest in the property, and at the same time she stated that the lots would be hers when she died. Again, this raises a conflict which can only be resolved by a

trial of these issues on the merits.

Similarly, there are claimed interests of Barnd and Nesbitt which were not foreclosed in *Hanner* v. *Hanner,* since they were not parties to that action either. Plaintiff's affidavits in the instant case do not state any facts which would militate against the existence of possible liens in favor of Barnd and Nesbitt. On the contrary, the Court can take judicial notice of the record in both cases and come to the conclusion that there were unrecorded liens against the lots in favor of those persons, which the master, by reason of his duties and position as master, in the divorce case, had actual notice. A judgment creditor does not take as an innocent purchaser. 33CJS Executions, Sec. 289, P. 582, notes 45 and 46. So the mere fact that he has a sheriff's deed in this case does not give him any priority over encumbrances, recorded or otherwise, which exist in favor of third parties and which he knows about. To cut off the claims of Betty Jo Knight, Barnd and Nesbitt, without a hearing on the merits, is to deprive them of their property without due process of law.

In the instant case the Court candidly admitted that all the provisions and technicalities concerning motions for summary judgment were not complied with. It would seem to us that under the *Rocklin* case, *supra,* that these matters and things could not be brushed aside; rather that the Court should require that this matter be reversed on that one point alone, and perhaps in the lower court, if necessary, the Appellants could raise other material issues of fact that could preclude the taking of a summary judgment. We earnestly contend that the allowing of the taking of a summary judgment without strict compliance with the rules and statutes appertaining thereto amount to the taking of propery without due process of law.

We urge that the Court read the deposition of the Appellee dated August 1, 1963, in which said deposition attorneys for Appellant, Mr. Levy and Mr. Feighner, asked the Appellee to accept his fees and mosts and all the moneys due him in lieu of keeping the real property for a smal part of its true value. The Appellee, Mr. DeMarcus, refused to accept the offer.

We attach herto, for the Court's consideration, to substantiate the matters and things set forth in the Motion, the Affidavit of the Attorney of Appellant during the lower court hearing and still attorney during this appeal, John M. Levy, the Affidavit of the Appellant, Josephine E. Hanner, and the Affidavit of the daughter of the Appellant, who was a party to the action, Betty Jo Knight.

We also attach herewith, in order to substantiate the matters and things contained in the Motion, the tax receipts, sewer assessment receipts, and leases with Foster & Kleiser for signs on the real property involved. Also in order to further substantiate the matters and things, we attach hereto a list of the personal property available for levy on September 18, 1959, the date of the issuance of the Writ of Execution, which list was extracted from the master's [Appellee] report. It should be kept in mind that we have only listed the personal property, and that there were several pieces of real property which could have been levied upon, in addition to the parcel levied upon in this matter.

The Court is invited to take judicial notice of the records of the Maricopa County Sheriff's Office with regard to the levy on Mrs. Hanner's real estate, which include the notes and memoranda of the levying officer. These records conclusively show that Mrs. Hanner was never personally contacted by any representative of the Sheriff's Office in regard to this Execution.

Counsel for Appellants have determined through checking titles that the Execution and sale in this matter should have excluded the west 25 feet of Lots 17 and 18, Wells Place, rather than the west 25 feet of Lots 19 and 20, Wells Place, the latter two lots being erroneous excluded in the judgment. Arthur Hanner in 1965, among properties conveyed to Mrs. Josephine Hanner by warranty deed, included the west 25 feet of Lots 17 and 18, Wells Place. This is another point of confusion in this proceeding where a trial on the merits would be of benefit to all parties concerned.

This being an equity case, to show good faith and absolute

sincerity on the part of the Appellant, we earnestly request that this Court order a rehearing or, preferably, a reversal of the Court's decision upon the condition that within ten days of the date of the Order the Appellant pay the Appellee all the monies due him for his services as a master and all the costs appertaining thereto. This would seem to be a fair and equitable solution rather than a harsh and inequitable conclusion of allowing a master, an officer of the court, who obtained knowledge concerning the property levied upon as an officer of the court, from keeping the said property for 12½% to 25% of its value. We in all sincerity make this offer and will comply with the same.

We respectfully urge that the Court grant oral argument on this Motion.

Respectfully submitted,
JOHN M. LEVY

RAYMOND R. WEIN
By: Raymond R. Wein

RAYMOND R. WEIN
Attorneys for Appellants

STATE OF ARIZONA }
County of Maricopa } ss.

JOHN M. LEVY, being first duly sworn, deposes and says:

THAT he is an attorney at law in the State of Arizona and that he has for the past several years been the attorney for the Appellant JOSEPHINE E. HANNER, also known as JOSEPHINE KNIGHT; that he was the attorney for the said Appellant both in her divorce proceedings, which was decided

by this Court, and in the present case, both in the lower court and in this Court;

THAT he has had his offices in the Heard Building, now known as the Greater Arizona Savings Building, on the fifth floor thereof, since about 1930 to date; that he recommended to the Court the appointment of Cecil DeMarcus as master in the divorce case, and that the said Cecil DeMarcus had his offices on the same floor as the Affiant for a long period prior to his appointment as master, moving from said floor on or about November 30, 1961; that after his appointment as master and during the time the divorce case was on appeal, and up to the time he moved from that floor, Mr. DeMarcus visited the offices of this Affiant concerning the status of the divorce case, and also saw Mrs. Hanner on many occasions during this period;

THAT he at no time made demand upon this Affiant for the payment of his fee, but stated that he would wait for the payment of his fee pending the final determination of the divorce proceedings; that he did not at any time inform the Affiant concerning the Writ of Execution, the basis of this lawsuit, and this Affiant had no knowledge of any kind or nature concerning the Execution until it was called to his attention by Mrs. Hanner, after the deed and tender had been received by Gladys Barnd.

THAT this Affiant states on oath that neither the Appellee, his attorneys, the sheriff or deputy sheriff, or any other person advised him concerning the Writ of Execution or asked him how to get in touch with the Appellant herein or made any demand upon him for payment of the judgment, and the entire transaction of the Writ of Execution, the running of the period of redemption, and during the entire period up to the time the quit claim deed and check for $5.00 were called to Mrs. Hanner's attention by Mrs. Barnd, this Affiant was unaware of the same; that this Affiant states that he was in Phoenix, Arizona, in his office on or about the 18th of September 1959, and during the months prior thereto and thereafter, and could have been informed regarding the matters and things stated herein; that this

Affiant knows of his own knowledge that had the Writ of Execution been called to the attention of this Affiant, that the Appellant JOSEPHINE E. HANNER could have within a matter of days raised the money to pay the judgment mentioned herein upon which the writ of execution was levied.

FURTHER AFFIANT SAYETH NOT.

John M. Levy
JOHN M. LEVY

SUBSCRIBED AND SWORN to before me this 9th day of May, 1967.

Elizabeth Knapp, Notary Public

My comm. expires Aug. 4, 1970.

STATE OF ARIZONA)
) SS:
County of Maricopa)

JOSEPHINE E. HANNER, formerly known as JOSEPHINE KNIGHT, being on oath duly sworn, deposes and says that she is the Appellant in this matter and that she states upon oath that Mr. DeMarcus on many occasions saw her in Mr. Levy's office and upon no occasion made a demand for the payment of his fee, and that he stated upon many occasions that he would wait until the final determination of the divorce proceedings in this Court for the payment of his fee; and Affiant relied upon Mr. DeMarcus' statement.

THAT this Affiant had no knowledge of any kind or nature from either the Appellee, his attorneys, sheriff or deputy sheriff, or any other person, of the issuance of the Writ of Execution and levy upon the real property, and received no communication, either by telephone or by mail concerning the same, although Mr. DeMarcus had her telephone number in connection with his duties as master herein; that she was fully unaware of the issuance of the Execution and levy thereon, the running of the time of redemption, until she was first advised by Mrs. Gladys

Barndt who called her to tell her she had received a quit claim deed for the real property involved and $5.00, under Section 12-1102 A.R.L., from the attorneys for Appellee, which was on or before November 17, 1962; and within a day or two thereafter similar deed and tender was received by Miss Glenn Nesbit, the Appellee Josephine E. Hanner, and Miss Betty Jo Knight.

THAT this Affiant forthwith through her attorney tried to get the Appellant to accept the judgment money rather than proceed with this action, but he refused to do so;

THAT this Affiant has lived since 1949 in Apt. 5, Patio del Palms, which was one of the properties gone into in great length in the divorce proceedings and was located directly behind the real property levied upon; that Mr. DeMarcus' employee Mr. Hughes had called upon Mrs. Hanner many times during the master's proceedings, and was fully aware of her address and telephone number;

THAT this Affiant states that had she known of the levy of the execution and the time running on the period of redemption, she would have within a few days paid off the said judgment.

This Affiant states that to her best knowledge and information she believes that the real property levied upon at the time of levy of execution was worth approximately $40,000; that she has paid the taxes and sewer assessments on the property from the time before and after the issuance of the Writ of Execution up to the present date on the real property levied upon, and has had a lease with Foster & Kleiser for two signs on said property and has received rental on same before the issuance of the writ and up to the present time from Foster & Kleiser and its successor, Eller Advertising Company, and is now receiving rent from same; that located upon said property is a laundry and storage room which has constantly been used by the Affiant before the Writ of Execution and up to the present date.

THAT this Affiant was in Phoenix on the date of the levy of the Writ of Execution, September 18, 1959, and for some period prior to that time and after that time and could have been

reached the day of the issuance of the writ and for a long period thereafter by either mail or telephone.

FURTHER AFFIANT SAYETH NOT.

Josephine E. Hanner
JOSEPHINE E. HANNER

SUBSCRIBED AND SWORN to before me this 9th day of May, 1967.

Vel Thorley, Notary Public
My Commission Expires
Oct. 27, 1968

STATE OF ARIZONA }
County of Maricopa } ss.

BETTY JO KNIGHT, being on oath duly sworn, deposes and says that she is the daughter of the Appellant JOSEPHINE E. HANNER, formerly known as Josephine Knight, and claims an interest in the real property levied upon in this cause;

THAT she at no time was informed, either by telephone or letter, nor was a message left with her nor mail sent to her mother in care of her, by either the Appellee, his attorneys, sheriff or deputy sheriff, or any other person, of the issuance of the Writ of Execution and the levy upon the real property;

THAT her name was on the pleadings in this action and that her name has appeared in the telephone directory as Betty Jo Knight, 121 West Granada Street, Phoenix, Arizona, telephone number AL 2-5472, for many years prior to 1959, during the year 1959, and up to the present date.

THAT this Affiant was in Phoenix on the day of the levy of the Writ of Execution, September 18, 1959, and for some period prior to that time and after that time, and could have been reached the day of the execution of the writ and for a long period

thereafter, by either mail or telephone.

This Affiant states that she had no knowledge of the Writ of Execution levied on the real property, the running of the period of redemption, nor any matter regarding the Writ of Execution until she was informed of same by her mother, which was on or about November 17, 1962; that within a day or two after she was informed by her mother she received a quit claim for the real property involved and $5.00, under Section 12-1102 A.R.L., from the attorneys for Appellee.

FURTHER AFFIANT SAYETH NOT.

Betty Jo Knight
BETTY JO KNIGHT

Val Thorley,
Notary Public

May, 1967.

My Commission Expires Oct. 27, 1968

STATEMENT OF ASSETS — 9-18-1959

Cash on Hand:

Bank Accounts	$1,500.00

Personal Property:

1956 Ford Station Wagon	$2,000.00
Furniture & Tools	$2,560.25

Notes & Contracts:

Schlarbaum, D.	$ 1,800.61
Herrd, Troy	$ 206.00
Cep, Philip	$ 799.00
Contracts	$17,284.99
	$26,150.85

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

BETTY JO KNIGHT, et als, Appellants, vs CECIL DeMARCUS, et ux, Appellees	No. 8228 OBJECTION TO MOTION FOR REHEARING

COMES NOW the Appellee, by and through his attorneys and respectfully objects to the granting of a rehearing in this matter, or any other relief, for the reasons and on the grounds that the Motion does not set forth proper grounds upon which a rehearing may be granted.

The Motion presents and denominates three grounds upon the basis of which it is asserted a rehearing should be granted. In order they are:

1) That the notice requirement of Rule 53a was not complied with. This matter has been met squarely by the Supreme Court in its original decision and is therefore not a proper subject of rehearing. As a parasitic grounds to ground No. 1, Appellants assert that there was a misapprehension concerning the law in the respect that Rule 53a required a body attachment instead of permitting an execution on property as was had in the instant case. It is respectfully submitted that the authorities submitted by the Appellants themselves unequivocally refute their own position. In the case of *Cutting vs Van Fleet, 252 Fed. 100,* not only was the Court's action in support of the fee of a master held to be discretionary, but in that case it was held that the Appellant therein had notice and an order to show cause which served no useful purpose. Neither of the points presented in Appellant's first asserted reason for grounds for rehearing comport with the criteria for rehearing, to-wit; that the decision reached by the Court is based upon a mistake or misapprehension

as to some matter of record or that there was a clear mistake of law overlooking some precident from this Court or that the Court has failed to realize the full effect of the ruling.

2) The second ground asserted for the basis for rehearing by Appellants is that there were defects in the levy or in actions taken by the sheriff of Maricopa County.

It is respectfully submitted these matters were not included in Appellant's presentation to the Supreme Court on its original decision and therefore have no proper place in a Motion for Rehearing. *Climate Control Inc. vs Hill, 87 Arizona 2013, 49 P2d 771.* It might be added gratuitously that the sheriff of Maricopa County is not a party to the action before the Court.

3) The third and "final ground" asserted by the Appellants as a reason for granting a rehearing is "the improvident granting of a summary judgment". As Appellee has respectfully pointed out concerning the first asserted grounds for a rehearing, the so called "improvident" granting of summary judgment has been briefed, argued, and determined and does not constitute a basis for rehearing. See Procedure on Rehearing, Charles C. Bernstein, 5 Arizona Law Review, 175, 189 (1964).

It is respectfully submitted that there is no basis in law or under Court rule for the requested argument on the motion and that Appellants requested argument should be denied and Appellant should have no relief under his Motion for Rehearing.

Respectfully submitted,

MAX M. KLASS
Max M. Klass

RONALD CARMICHAEL
Ronald Carmichael

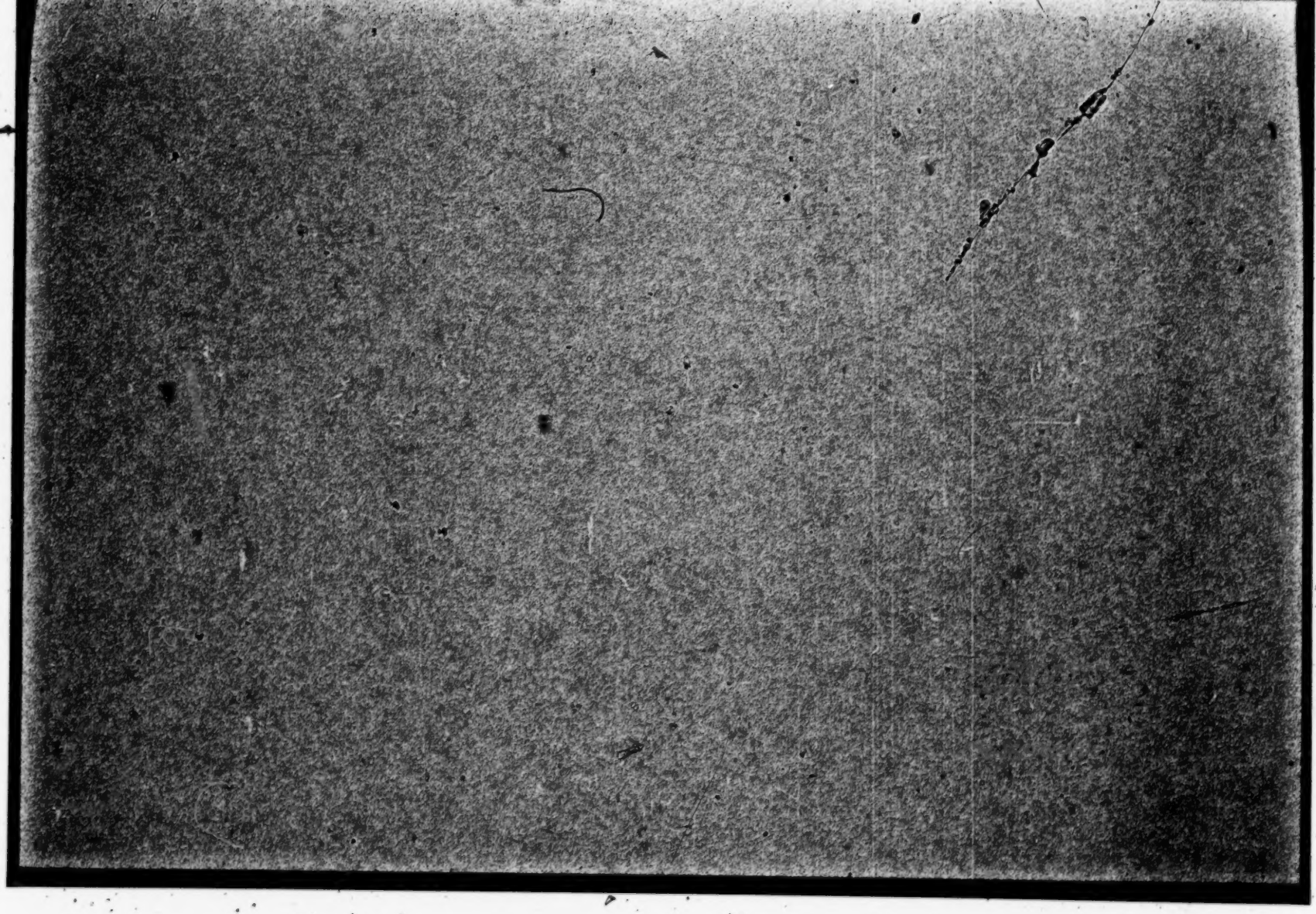
SUPREME COURT
STATE OF ARIZONA
PHOENIX
May 24, 1967

BETTY JO KNIGHT, et al, Appellants, v. CECIL DeMARCUS, et al, Appellees.	No. 8228

The following action was taken by the Supreme Court of the State of Arizona on Tuesday, May 23, 1967, in regard to the above-entitled cause:

"ORDER: Appellants' motion for rehearing—DENIED."

SYLVIA HAWKINSON, Clerk
By Lucile Brooks
Assistant Clerk



Supreme Court of the United States

No. 497 ----- , *October Term, 19* 67

Josephine Hanner,

Petitioner,

v.

Cecil DeMarcus, et ux.

ORDER ALLOWING CERTIORARI. Filed November 6 ----------, 19 67.

The petition herein for a writ of certiorari to the Supreme Court of the State of Arizona ----------

is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.